United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 28, 2007

TO : Helen E. Marsh, Regional Director
Region 3

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: International Brotherhood of Teamsters,
New York State Teamsters 554-1467-7200
United Parcel Service Upstate/ 554-1483-0100
West New York Districts
Negotiating Committee
(United Parcel Service)
Case 3-CB-8583

This case was submitted for advice as to whether the Union violated Section 8(b)(3) of the Act by refusing to execute a mid-term modification of the parties' current collective-bargaining agreement to codify apparent past practices.

We conclude that the Union did not violate Section 8(b)(3) by refusing to execute the proposed mid-term modification, as Section 8(d) of the Act creates no obligation to execute mid-term contract modifications, absent mutual consent.[1]

FACTS

The Employer and the International Brotherhood of Teamsters (the International) have a nationwide bargaining relationship. International Brotherhood of Teamsters, New York State Teamsters United Parcel Service Upstate/West New York Districts Negotiating Committee (the Union) is a collection of local unions in upstate and western New York that bargain with the Employer as a group over local issues. The Employer and the Union are parties to the "New York supplement" (NYS) to the National Master Agreement negotiated between the Employer and the International.

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[1] The Region also submitted this case for advice as to whether the charge in the instant case is time-barred under Section 10(b) of the Act. Given our conclusion that the charge in the instant case should be dismissed on the merits, we need not determine whether it was timely filed.

Since at least 1979, each NYS has contained pension language governing the Employer's contributions to a jointly-administered pension fund (the Fund). The 1979-1983 NYS contained language stating that the Employer's contributions to the Fund for each employee would not exceed a maximum of 8 hours per day or 40 hours per week. The 1982-1985 NYS omitted any reference to the 8-hours-per-day cap, but indirectly referenced the 40-hours-per-week cap. Such language remained in a contract extension through 1987 and the 1987-1990 NYS.

In 1989, during the term of the 1987-1990 NYS, the parties executed a "clarifying amendment" to the NYS that recognized, in writing, an 8-hours-per-day and 40-hours-per-week cap on the Employer's Fund contributions. In addition, this 1989 amendment deleted references to the "General Freight Agreement" that historically had been included in the health and welfare articles of the NYS.[2] The 1989 amendment expressly stated that it was effective until the 1987-1990 NYS expired.

Neither party proposed any changes to the NYS Fund article during the bargaining sessions that resulted in the 1990-1993 NYS; nor did the parties take any action to incorporate the 8-hours-per-day cap language of the 1989 amendment into the NYS. Thus, the 1990-1993 NYS executed by the parties also included a 40-hours-per-week limit, but made no reference to a daily cap. Notwithstanding the absence of a written daily cap, and without objection from the Union, the Employer continued to make Fund contributions as if both the 8-hour and 40-hour caps were in effect.

During the 1993, 1997, and 2002 successor agreement negotiations, the Union proposed language that would have eliminated any 8-hours-per-day Fund contribution cap. The Employer rejected each of these proposals, and the Union withdrew them. The Employer did not, however, ever propose language that would have incorporated the 8-hours-per-day cap into the written NYS. Thus, the parties' current collective-bargaining agreement, effective from 2002 through 2008, contains language providing for the 40-hours-per-week cap, but not the 8-hours-per-day cap.

As for the references to the General Freight Agreement, while the 1989 amendment called for the deletion

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[2] The General Freight Agreement provides for more generous terms concerning fund contributions for certain sick leave and vacation time.

of the term from the NYS, the parties continued to include the language in the 1990-1993 NYS, and executed every successor agreement with the language unchanged. Neither party made any proposals in subsequent negotiations to delete or alter the General Freight Agreement language in the NYS.

In 1998, during the term of the 1997-2002 NYS, the Fund sued the Employer in federal court to recover unpaid contributions for overtime hours, sick leave, and other types of leave. In an April, 2002 decision, the district court found that "the 1989 Amendment was in effect until such time as the parties negotiated a different arrangement" and that, under the NYS, the Employer's "contribution obligations were limited to an eight-hours-per-day cap."[3] Notwithstanding this determination, however, the district court held that the Participation Agreement between the Employer and the Fund overrode the collective-bargaining agreement's provisions, that the Employer could not rely on the 8-hour cap in the collective-bargaining agreement to limit its liability, and that the Employer was required to make the Fund whole for the hours at issue, i.e., when employees worked in excess of 8 hours per day but less than 40 hours during that week. Specifically, the district court found that, "assuming that the 1989 Amendment, with its eight-hours-per-day cap, became part of subsequent [collective-bargaining agreements], those [collective-bargaining agreements] are inconsistent with the Participation Agreements, which do not have an eight-hours-per diem cap."[4]

The Employer appealed the district court's decision to the Second Circuit. The Second Circuit held that the district court's "conclusion giving controlling and superseding effect to the Participation Agreements may be an overstatement."[5] Nevertheless, the Second Circuit reached the same result as the district court, determining that "otherwise valid collection regulations promulgated by a multi-employer plan to effectuate contributions cannot be

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[3] New York State Teamsters Conference Pension & Retirement Fund v. United Parcel Service, 198 F.Supp.2d 188, 197 (2002).

[4] Id. at 199.

[5] United Parcel Service v. New York State Teamsters Conference Pension & Retirement Fund, 382 F.3d 272, 279 (2004).

defeated by implied or unwritten agreements between employers and unions."[6] In explaining its rationale, the court stated that multiemployer plans should be able to ascertain a collective-bargaining agreement's provisions by reading that agreement rather than interviewing negotiators or tracing provisions back to expired agreements. The court also noted that its ruling was akin to the common-law parol evidence rule that encourages parties to memorialize their "unwritten understandings."[7] Thus, the Second Circuit's decision was expressly based on its conclusion that any 8-hour-per-day cap that the parties may have agreed upon, or understood that they had, was no more than an "implied" or "unwritten" understanding.

On March 22, 2006, after having settled its lawsuit obligations with the Fund, the Employer sent the Union a proposed "Supplemental Agreement" accompanied by a letter from the Employer's Corporate Labor Relations Manager. The letter stated that the district court had found that the 8-hour cap was a component of the parties' collective-bargaining agreement, and that the Employer was requesting, in accordance with Section 8(d) of the NLRA, that the Union sign an amendment to the existing contract: 1) reflecting the parties' long-term agreement that the Employer was not obligated to make Fund contributions for any more than 8 hours per day per employee, and 2) deleting what the Employer characterized as erroneous references to the General Freight Agreement. The Union ignored the Employer's request, and the Employer sent a second such request on May 11, 2006.

The Chairman of the Union's UPS Teamsters Upstate Committee responded on behalf of the Union on May 25, 2005. The Union's letter stated that, as the Second Circuit had decided that the Employer's Fund contributions were not limited to 8 hours per day per employee, the Union would not execute the proposed supplemental agreement.[8]

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[6] Id. at 280.

[7] Id. at 280-281.

[8] The Union's May 25, 2006 letter did not reference the General Freight Agreement. However, the Union subsequently took the position that it also would not execute a supplemental agreement removing the General Freight Agreement language.

On August 29, 2006, the Employer filed the charge in the instant charge, alleging that the Union's refusal to execute the proposed supplemental agreement violates Section 8(b)(3) of the Act.

ACTION

We conclude that the Union did not violate Section 8(b)(3) by refusing to execute the proposed mid-term modifications, as Section 8(d) of the Act creates no obligation to execute a mid-term contract modification, absent mutual consent.

Section 8(d) of the Act requires that parties who have reached agreement on the terms of a collective-bargaining agreement or an amendment thereto must execute that agreement upon the request of the other party.[9] Pursuant to Section 8(d), however, neither party to a collective-bargaining agreement may compel the other party "either to discuss contract changes or agree to them" during the term of a contract.[10] Accordingly, it well established that there is no obligation on either party to modify a collective-bargaining agreement during its term, absent the parties' agreement to do so.[11]

Here, we conclude that the additional language the Employer requested the Union to execute would constitute a

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[9] See, e.g., International Brotherhood of Electrical Workers, Local 2326, AFL-CIO, 348 NLRB No. 91, slip op. at 3, citing H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941).

[10] The Boeing Company, 337 NLRB 758, 762 (2002). See also, e.g., Abbey Medical/Abbey Rents, Inc., 264 NLRB 969, 969 fn. 1 (1982), enfd. mem. 709 F.2d 1514 (9th Cir. 1983) ("under Section 8(d) of the Act, no party to a collective-bargaining agreement can be compelled to discuss or agree to a midterm modification of a collective-bargaining agreement, and, accordingly a proposed modification can be implemented only if the other party's consent is first obtained").

[11] See, e.g., Hydrologics, Inc., 293 NLRB 1060, 1062 (1989) ("Section 8(d) does not impose on the parties a bargaining obligation when they make or receive proposals seeking midterm contract modifications; rather it prevents the employer from implementing a midterm contract modification without the consent of the union").

mid-term modification of the parties' collective-bargaining agreement. It is undisputed that the parties' current collective-bargaining agreement contains no language limiting the Employer's Fund contributions to 8 hours per day; none of the parties' written agreements in effect since 1990 have included any such language. Indeed, the Second Circuit expressly based its holding on the conclusion that the 8-hour limit is no more than an "implied" or "unwritten" understanding between the parties, and not a part of their written collective-bargaining agreement. As such, the court made a critical distinction between a written collective-bargaining agreement, on one hand, and an implied or unwritten agreement or past practice, on the other. This distinction motivates our conclusion here; as the parties did not agree to include an 8-hour-per-day cap in their written collective-bargaining agreement, and as Section 8(d) does not require parties to execute mid-term amendments to a collective-bargaining agreement absent agreement to do so, the Union was not required to execute in writing the parties' unwritten or implied agreement.

Our own review of the parties' bargaining history further supports this conclusion. During each of the last 3 contract negotiations the Union proposed that the parties' agreement explicitly require the Employer to make Fund contributions for hours worked in excess of 8 per day. While the Union withdrew each of these proposals, the Employer never proposed that the agreement include the 8-hours-per-day Fund contribution cap it now seeks to require the Union to execute mid-term. This was the case even with respect to the negotiations preceding the current 2002-2008 collective-bargaining agreement, which occurred after the Employer was already involved in the Fund litigation, and after the district court had found the Employer liable for additional Fund contributions because of the absence of this language in the parties' collective-bargaining agreement. Instead of insisting on an 8-hour cap, the Employer again merely proposed a collective-bargaining agreement that includes a 40-hours-per-week Fund contribution cap and no per-day cap. Such continued inaction by the parties does not indicate any agreement to include the per-day cap in their written collective-bargaining agreement.

We recognize that the Employer may have a strong argument that the parties' long-standing consistent past practice has made the 8-hours-per-day cap into a bona fide term and condition of employment to which both the Employer and the Union are bound unless and until the parties

negotiate something different.[12] This does not, however, imply a Section 8(d) obligation on the part of the Union to execute the proposed mid-term modification to the parties' written collective-bargaining agreement. Indeed, the Employer does not cite any case authority in support of finding such an obligation.

Similarly, the Union did not violate Section 8(b)(3) by refusing to agree to delete the language in the current collective-bargaining agreement that refers to the General Freight Agreement, which has been part of the parties' last four agreements. As with the 8-hour Fund contribution cap, even if there is an established past practice regarding the effect of this language, there is no obligation to execute a mid-term modification of the written contract to incorporate an unwritten past practice that the parties had not agreed to reduce to writing.

Moreover, the Union is under no obligation to agree to rescind the General Freight Agreement language as a "mistake" which vitiated the parties' agreement due to a lack of "meeting of the minds."[13] Even assuming, arguendo, that the language in question was mistakenly restored to the 1990-1993 NYS, it has remained in the three NYS negotiated since then, including the current agreement, which was entered into after this language was expressly at issue in the Fund lawsuit. Thus, while the Union made no proposals in negotiations regarding these provisions, the Employer was clearly on notice of them prior to the parties' agreement to the current contract and took no action to delete the language from the parties' collective-bargaining agreement. Therefore, as with the 8-hours-per-day Fund contribution cap, the rescission of the General Freight Agreement language would be a clear mid-term modification to the collective-bargaining agreement which the Union had no obligation to execute.

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[12] See, e.g., Communications Workers (C & P Telephone), 280 NLRB 78, 82-83 (1986), enfd. mem. 818 F.2d 29 (4th Cir. 1987) (union violated Section 8(b)(3) by refusing to continue past practice that had become a term and condition of employment).

[13] See, e.g., Apache Powder Co. 223 NLRB 191 (1976); Hospital Employees Local 1199 (Lennox Hill Hospital), 296 NLRB 322 (1989).

Accordingly, the Region should dismiss the Section 8(b)(3) charge in the instant case, absent withdrawal.

B.J.K.